In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. [redacted]72

JOHN M. LEHMANN,
Officer in Charge,

Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* BRUNO CARSON or BRUNO CARASANITI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION.

HENRY C. LAVINE,
Williamson Bldg., Cleveland, Ohio,
Attorney for Respondent.

TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statutes Involved 2

Statement 4

Reasons for Denying the Writ 6

Conclusion 14

TABLE OF AUTHORITIES.

Cases.

C____; *Matter of*, Interim Decision No. 739 (Board of Immigration Appeals, Sept. 1, 1955) 13

Evans vs. Murff, 135 F. Supp. 907 (D. Md.) 8

Gagliano vs. Bonds, 222 F. 2d 958 (C. A. 5) 6, 7

Marcello vs. Bonds, 349 U. S. 302 ..... 6, 7

Pino vs. Landon, 349 U. S. 901 6

Robles-Rubio, Ex Parte, 119 F. Supp. 610 (N.D. Cal.) 8, 9, 13

Shomberg vs. United States, 348 U. S. 540 ..... 9, 12, 14

U. S. vs. Menasche, 348 U. S. 528 ..... 8, 9, 11, 12, 14

United States ex rel. De Luca vs. O'Rourke, 213 F. 2d 758 (C. A. 8) 8, 9, 13

U. S. ex rel. Sciria vs. Lehmann, 136 F. Supp. 458 (N. D. Ohio) 5, 8, 13

Statutes.

Immigration Act of Feb. 5, 1917, Sec. 19 4

Nationality Act of June 27, 1952:

Sec. 241(a)(1) (8 U. S. C. 1251(a)(1)) 2

Sec. 241(a)(4) (8 U. S. C. 1251(a)(4)) 2, 7

Sec. 241(b) (8 U. S. C. 1251(b)) 3

Sec. 241(d) (8 U. S. C. 1251(d)) 3, 7, 10

Sec. 311 (8 U. S. C. 1422) 10

Sec. 313(a) (8 U. S. C. 1424(a)) 10

Sec. 315(a) (8 U. S. C. 1426(a)) 10

Sec. 318 (8 U. S. C. 1429) 10

Sec. 331(d) (8 U. S. C. 1442(d)) 10

Sec. 405(a) (8 U. S. C. 1101 note) 3, 8, 10

45 Stat. 1512 12

28 U. S. 1254(1) 1

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No. 908.

JOHN M. LEHMANN,
Officer in Charge,
Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* BRUNO CARSON or BRUNO CARASANITI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 228 F. 2d 142 (R. 21-32) and the findings of the District Court are unreported (R. 49-50).

JURISDICTION.

The judgment of the Court of Appeals was entered on December 17, 1955, and on January 30, 1956 a petition for rehearing was denied. The petition for certiorari herein was filed on April 27, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

1. Whether an alien who entered the United States as a stowaway in 1919 and who was not deportable under the prior immigration law, became deportable under the provisions of the 1952 Immigration and Nationality Act.

2. Whether an alien who was not deportable under prior immigration law because he had been conditionally pardoned of a criminal conviction, became deportable under the provisions of the 1952 Immigration and Nationality Act.

STATUTES INVOLVED.

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, provides in pertinent part:

> "Section 241 (a) (1), 66 Stat. 204, 8 U. S. C. (1952 ed.) 1251 (a) (1):
>
> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> Section 241 (a) (4), 66 Stat. 204, 8 U. S. C. (1952 ed.) 1251 (a) (4):
>
> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *.
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether

confined therefor and regardless of whether the convictions were in a single trial;

Section 241 (b), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1251 (b):

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter; a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

Section 241 (d), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1251 (d):

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

Section 405 (a), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1101 note:

(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or

warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *"

The Immigration Act of February 5, 1917, 39 Stat. 874, provided in pertinent part:

"SEC. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or shall be found in the United States in violation of this Act, or in violation of any other law of the United States; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: * * * Provided further, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned * * *."

STATEMENT.

Respondent is a 53 year old native of Italy who came here in 1919 as a stowaway (R. 103). He is married to a native-born citizen of the United States and is the father of four American-born children, the youngest of whom are aged 12 and 10 years. Respondent has been a carpenter and builder for several years and his present good character is undisputed.

In 1941 deportation proceedings were instituted against respondent based solely upon two convictions in 1936. These proceedings were cancelled in 1945 when Governor Lausche, of Ohio, granted respondent a pardon for one of his offenses conditioned upon his conducting himself thereafter as a law abiding person. This pardon indisputably granted respondent immunity from deportation under the law then in effect.

More than eight years later, in 1953, deportation proceedings were instituted anew against respondent under the 1952 Immigration and Nationality Act, although he had been law-abiding and of good character during the intervening period. An order of deportation was entered in 1954 upon the ground that respondent was deportable for entry into the United States as a stowaway in 1919 and because of his two convictions in 1936. The pardon was refused recognition on the theory that it was not a full and unconditional pardon as required by the new law.

Respondent filed a writ of habeas corpus which was dismissed by the District Court. It should be observed, however, that the same District Judge subsequently held in *U. S. ex rel. Sciria vs. Lehmann*, 136 F. Supp. 458 (N. D. Ohio) that an alien in the respondent's situation was not subject to deportation, and there stated that his conclusion in this Carson case had been in error.

The Court of Appeals reversed the dismissal of the writ and held that respondent had a non-deportable status under prior legislation which was preserved by the savings clause of the 1952 Act.

REASONS FOR DENYING THE WRIT.

1. The Government's effort to wring a conflict (Pet., p. 3) out of the decision below and the decisions in *Marcello vs. Bon* , 349 U. S. 302, *Gagliano vs. Bonds*, 222 F. 2d 958 (C. A.) and *Pino vs. Landon*, 349 U. S. 901, is both strained and futile.

With respect to the *Marcello* case, the Government concedes, as it must, that "this Court did not expressly pass upon the savings clause issue" (Pet. pp. 11-12). It admits, as it must, that *Marcello* belatedly sought to raise the savings clause issue in a supplemental petition for certiorari, which was denied (Pet., p. 11). Thus, the Government is forced to qualify its argument respecting *Marcello*, by referring to the "implications of the ruling" (Pet., p. 10), and what that decision "implicitly" held (Pet., p. 12).

Traditionally, this Court does not decide or foreclose issues not presented to it or in the Courts below. The present issue was not raised in *Marcello* in the lower courts. That this issue was not before this Court was acknowledged by the Government in its *Marcello* brief (p. 41, footnote 8). Marcello's untimely effort to bring this issue before this Court in a supplemental petition for certiorari, was denied, 348 U. S. 805. This Court's decision in the *Marcello* case makes no mention of the relationship between the savings clause and the deportation provisions here involved. There is plainly no conflict between the decision below and *Marcello*.

The Fifth Circuit's per curiam decision in *Gagliano vs. Bonds*, 222 F. 2d 958, acknowledges the fact that the savings clause issue was not presented in the *Marcello* case, but concluded: "we think that issue * * *, *whether formally presented and argued or not*, was implicitly foreclosed by the *Marcello* decision, and, hence, is no longer

open for decision by this Court." 222 F. 2d at 959 (Emphasis added).

Just as the Government's reliance on *Marcello* is misplaced, so too is its reliance upon *Gagliano*. For, as is apparent from the portion of the decision quoted *supra*, *Gagliano* contains no reasoned conclusion; it hinges solely on a reading of *Marcello* which, as we have indicated, is incorrect.

The conflict which the Government purports to find between the decision below and the decision in *Pino v. Nicholls*, 215 F. 2d 237, revsd. sub nom. *Pino v. Landon*, 349 U. S. 901, is equally without substance. First, it should be noted that this Court reversed the decision of the First Circuit sustaining deportation, in a per curiam opinion which held that one of the convictions was not sufficiently final to support an order of deportation. Thus, the decision of the Court of Appeals in the *Pino* case, having been reversed by this Court, has limited, if any, significance.

However that may be, the First Circuit in the *Pino* case was concerned with the construction of Section 241 (a) (4) of the Immigration Act of 1952 in the limited sense of determining whether this section applied to aliens who had been convicted of crimes prior to the effective date of the 1952 Act. It noted that the word "hereafter" which had been contained in the prior law had been omitted from the 1952 provision, and concluded that the provision applied to aliens who had been convicted of crimes prior to the Act's effective date. 215 F. 2d at 246. It found reinforcement for this view by reference to Section 241(d). *Ibid.* ***But nowhere in its opinion did it mention or consider the application or effect of the savings clause,*** which is the heart of the issue in this case.

2. The decision below is in complete accord with those decisions in which the application and effect of the savings

clause has been considered in similar or analogous circumstances. See *United States ex rel. De Luca vs. O'Rourke*, 213 F. 2d 758 (C. A. 8); *Ex Parte Robles-Rubio*, 119 F. Supp. 610 (N. D. Cal.); see also *U. S. ex rel. Sciria vs. Lehmann*, 136 F. Supp. 458 (N. D. Ohio).[1] In these cases it was held that aliens who had obtained a judicial recommendation against deportation, which barred their deportation under prior law, could not be deported under the new law even though the new law did not provide for judicial recommendation against deportation in their particular situations. In each instance the court based its decision on the provisions of Section 405 (a) of the Immigration Act of 1952, the savings clause which is in issue in this case.

Petitioner asserts, as one of the grounds for granting certiorari in the instant case, that the Court below, and the Eighth Circuit in the *De Luca* case, *supra*, expressed doubts as to the scope of the savings clause. Neither the Court below, nor the Eighth Circuit expressed such doubts. The decision below states that "*if*" the matter is not "entirely free from doubt," the result reached is consistent with the rule of statutory construction expressed by this Court in *United States v. Menasche*, 348 U. S. 528 "to give effect, if possible, to every clause and word of a statute." 228 F. 2d 147. And in *De Luca*, the Eighth Circuit concluded that:

> "We feel justified in ruling that there is no clear cut authority in the Act for depriving De Luca of the status of a non-deportable alien resulting from the

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[1] The Government's summary (Pet., p. 14) of the District Court decision in *Evans v. Murff*, 135 F. Supp. 907 (D. Md.) is misleading. That Court summarily dismissed the alien's claims challenging the deportation order as follows: "plaintiff did not raise the issue of deportability before the Board of Immigration Appeals, and it is too late for him to raise it now." 135 F. Supp. at 909. The decision was thereafter devoted to the refusal to grant discretionary relief.

recommendations of the sentencing judge that he be not deported." 213 F. 2d at 715.

And in *Ex Parte Robles-Rubio, supra*, Judge Goodman, unequivocally stated that:

"In my opinion, this provision [Section 405(a), the savings clause] was designed to meet just such a situation as is presented here." 119 F. Supp. at 614.

Significantly, the Government never sought certiorari in the *De Luca* case. Even more significantly, the Government did not even appeal from Judge Goodman's decision in *Ex Parte Robles-Rubio*. Indeed, if—as the Government asserts—the *De Luca* case reflected doubts, the Government was delinquent *at that time* in not seeking clarification of that decision by certiorari.[2] The petition for certiorari in the instant case seems to be an untimely and unseemly effort to procure a review of cases decided long ago after the time for appeal and certiorari have long expired.

3. The decision below is in complete harmony with this Court's decisions in *U. S. v. Menasche*, 348 U. S. 528 and *Shomberg v. United States*, 348 U. S. 540. As the Court of Appeals below observed, "the Menasche and Shomberg opinions thus clearly teach that the savings clause is to be interpreted as protecting the status acquired under prior legislation, unless the intent to withdraw that protection is manifestly clear." (228 F. 2d 146). In the *Shomberg* case this Court noted that Congress had es-

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[2] Even assuming that the Eighth Circuit's decision in *De Luca* can be read as "expressing doubts," as the Government asserts, it should be noted that this decision ante-dated by almost a year the decisions of this Court, in *Menasche* and *Shomberg*, where the scope and effect of the savings clause was discussed. Whatever doubts may have existed at the time the *De Luca* case was decided, were completely and thoroughly resolved by this Court in *Shomberg* and *Menasche*.

tablished a statutory scheme which exempted certain provisions of the Act from the operation of the savings clause. In each case, Congress specifically provided for such exemption by the language, "notwithstanding the provisions of Section 405 of the Act." This Court listed the Sections exempted from operation of Section 405, as follows: Section 311, 66 Stat. 239, 8 U. S. C. § 1422; Section 313(a), 66 Stat. 240, 8 U. S. C. § 1424(a); Section 315(a), 66 Stat. 242, 8 U. S. C. § 1426(a); Section 318, 66 Stat. 244, 8 U. S. C. § 1429; and Section 331(d), 66 Stat. 252, 8 U. S. C. § 1442(d).[3] These Sections all contain the "notwithstanding" language referred to above. This Court did *not* list Section 241(d) which petitioner seeks to urge is exempted from operation of Section 405. Section 241(d) makes no reference to Section 405 at all.

As noted by this Court of Appeals, below, the argument advanced by the petitioner would make the savings

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[3] "Section 311 provides that the right to naturalization shall not be abridged because of race, sex or marriage, and, '(n)otwithstanding section 405(b), this section shall apply to any person whose petition for naturalization shall hereafter be filed, or shall have been pending on the effective date of this Act.' 66 Stat. 239, 8 U. S. C. § 1422, 8 U. S. C. A. § 1422.

"Section 313(a) states: 'Notwithstanding the provisions of section 405(b), no person shall hereafter be naturalized' who engages in specified subversive activities or who is a member of described subversive organizations. 66 Stat. 240, 8 U. S. C. § 1424(a), 8 U. S. C. A. § 1424(a).

"Section 315(a) provides: 'Notwithstanding the provisions of section 405(b),' one who claims or has claimed his alienage and 'is or was' thereby relieved of service in the armed forces, 'shall be permanently ineligible to become a citizen.' 66 Stat. 242, 8 U. S. C. § 1426(a), 8 U. S. C. A. § 1426(a).

"Section 331(d) provides for the ending of enemy alien status and states: 'Notwithstanding the provisions of section 405(b), this subsection shall also apply to the case of any such alien whose petition for naturalization was filed prior to the effective date of this Act and which is still pending on that date.' 66 Stat. 252, 8 U. S. C. § 1442(d), 8 U. S. C. A. § 1442(d)."

clause all but meaningless. The effect of his argument is that where there has been a specific change in the law relating to deportation, the savings clause has no application. Yet, as the Court below stated, "it is only when there has been a change that the savings clause is of any moment at all." The Court below further observed quite properly:

> "On the other hand, the conclusion we have reached does no violence to the provisions of section 241(d) of the Act, 8 U. S. C. A. § 1251(d), making the provisions as to deportability contained in section 241 applicable even though the alien entered the United States or that the other facts which make him deportable occurred prior to the passage of the Act. It must be remembered that section 403 of the 1952 Act expressly repealed the predecessor statutes, among them specifically the 1917 and 1924 Act. The purpose and effect of section 241(d) is therefore to remove any doubt that the provisions of the Act as to deportation shall have retrospective as well as prospective application insofar as they are not superseded by the savings provisions of section 405. For example, we can assume without deciding that section 241(a)(1), 8 U. S. C. § 1251(a)(1), would serve to make an alien deportable who entered the United States as a stowaway subsequent to July 1, 1924."

The Court below also comments that the savings clause of the 1952 Immigration and Nationality Act is as broad as any enacted by Congress and that it should be given a liberal interpretation to preserve previously acquired status unless an express exemption is set forth in clear and unequivocal language. This obviously follows the views expressed by this Court in *U. S. v. Menasche*, 348 U. S. 528, 533, 535, where it was said:

> "The 1952 Act made the enumeration of matters preserved by subsection (a) more complete and all-inclu-

sive by adding: 'status,' 'condition,' 'right in process of acquisition,' 'liability,' and 'obligation.' "

* * * * *

"The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provisions, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress."

In view of the statutory scheme spelled out by Congress, itself, and in view of this Court's clear ruling on the scope of the savings clause in *Menasche* and *Shomberg*, the decision below requires no further review by this Court.

4. The issue presented by respondent's entry in 1919 as a stowaway is one of narrow compass and concerns only the limited class of persons who came into this country as a stowaway, have been here over thirty years, and were never naturalized. As the Court below acknowledged, aliens arriving here after 1924 without documents remain deportable without time limitation. However, ever since 1929,[4] Congress has indicated its concern to permit aliens in respondent's category to remain in the United States.

"* * * Congress has adhered consistently to a policy of permitting aliens who unlawfully entered the United States prior to July 1, 1924, to apply for a status of permanent residence in this country. * * * It is unreasonable to suppose that Congress would reverse its long-standing policy towards excludable aliens who entered this country prior to July 1, 1924, otherwise

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[4] 45 Stat. 1512.

than by a plain and specific declaration of its purpose to do so. Section 1251(a)(1) [Section 241] cannot be construed as expressing such intention." *U. S. ex rel. Sciria vs. Lehmann*, 136 F. Supp. 458, 461, 462 (N. D. Ohio 1955).

The foregoing makes it clear that we are not here concerned with the general application of the savings clause but rather with its specific application to the small group of aliens who had entered prior to 1924, and to whom Congress has traditionally extended special benefits. In view of this limited application and in view of the correctness of the decision below and the *Sciria* case, it is submitted that certiorari is not appropriate.

5. The issue as to respondent's deportability by reason of crimes involving moral turpitude likewise revolves around the narrow issue of the effect to be accorded pardons granted aliens prior to the 1952 Immigration and Nationality Act. This issue will not affect many aliens, nor does its solution have any more far reaching scope than the similar cases of *U. S. ex rel. DeLuca v. O'Rourke, supra*, where the Government declined to seek certiorari, or *Ex parte Robles-Rubio, supra*, where the Government did not even appeal.

The Government freely admits that "A judicial recommendation against deportation continues to bar deportation under Section 241 (b) of the 1952 Act * * *" (Pet., p. 15, note 6). Such was the holding in *U. S. ex rel. DeLuca v. O'Rourke, supra*. Such is the present administrative construction of the 1952 Immigration and Nationality Act. *Matter of C----*, Interim Decision No. 739 (Board of Immigration Appeals, Sept. 1, 1955).

The same principle is applicable here. The only essential difference relates to the manner in which the status of non-deportability was acquired. DeLuca acquired it by

judicial recommendation. Respondent herein acquired it by an executive pardon. If the non-deportable status of DeLuca who violated our narcotic laws is preserved by the savings clause, no logical reason exists for treating respondent's violation, pardoned by a state governor, as being in different category. On the contrary, respondent's crime has been forgiven. DeLuca's has not. A pardon should have greater, not less, efficacy than a recommendation against deportation.

The decision below correctly applies the savings clause, without differentiating capriciously between judicial recommendations and executive pardons. In this respect it is consistent with all other decided cases, and with the present administrative construction of the Act.

CONCLUSION.

In view of the restricted issues presented below, in view of the proper application by the Court below of the savings clause of the 1952 Immigration Act, and in view of this Court's recent decisions in *United States v. Menasche*, 348 U. S. 528 and *Shomberg v. United States*, 348 U. S. 540 it is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

HENRY C. LAVINE,

Attorney for Respondent.